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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re B. W., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

B. W.,

Defendant and Appellant.

A125110

(Contra Costa County
Super. Ct. No. J0801521)

B. W. appeals from a dispositional order of probation upon the juvenile court's finding that he committed assault by force likely to produce great bodily injury and battery causing great bodily injury (Pen. Code, §§ 245, subd. (a)(1), 242, 243, subd. (d)). He contends that there is insufficient evidence to support the court's findings and that the court erred in failing to exercise its discretion to designate the offenses as either felonies or misdemeanors as required by Welfare and Institutions Code section 702 (section 702). We agree that the record does not explicitly indicate that the court exercised its discretion under section 702 and therefore remand the matter.

I. FACTUAL BACKGROUND

At approximately 2:30 p.m. on September 10, 2008, Joshua Johnson, an assistant junior varsity coach for the Deer Valley High School basketball and football teams, was standing in the parking lot of the Burger King adjacent to the school. Johnson was a

2008 graduate of the school. He saw defendant, who he knew from having taken classes with him, run past him in the parking lot. Defendant was wearing a black “hoodie” and a Spider-man backpack, blue jeans, and black shoes. He took the hoodie off and threw it on the ground. He had on a white shirt under the hoodie, and a short sleeve red shirt under the white shirt. Johnson then saw defendant hit D. C. at least twice in the face. The blows knocked D. C. into the bushes. Johnson did not see how D. C. got hit in the back of the head, but noticed the injury when he saw security personnel respond to help D. C. get up and apply ice to the back of his head. Defendant fled toward the shopping plaza across the street.

Officer Brady, the Deer Valley High School resource officer, responded to the scene. Brady saw that D. C. had a large golf ball size bruise behind his ear. D. C. was confused and disoriented and told Brady that he did not see his attacker because he was struck from behind. Brady spoke with Johnson, who he knew as both a former student and a volunteer in the athletic department. Johnson provided a description of the suspect as an African-American juvenile male wearing a red and black checkered shirt, jeans, and a Spider-man backpack. There were several students in the parking lot, but all said that they had arrived after the incident. Brady broadcast the description of the suspect.

Detective Sierra, heard the broadcast and patrolled the area. She located defendant who matched the description. Defendant was wearing a white shirt under the red shirt. Johnson subsequently identified defendant in an in-field showup. Johnson testified that he identified defendant because he knew him, not because he was wearing the clothing he had described.

Brady subsequently interviewed D. C. who told him that he had a couple of verbal disagreements with other students on the day of the incident.

The parties stipulated to the following facts: D. C. was outside the Burger King after school on September 10, 2008, when he was punched in the head by an unknown assailant. After falling to the ground, he felt hits coming from everywhere and covered up to try to protect himself. He momentarily lost consciousness during the assault. Defendant was brought to the Burger King while D. C. was being treated by paramedics;

he was unable to identify defendant as the person responsible for the assault. D. C. was taken to Sutter Hospital where he was treated for a concussion.

In defense, defendant testified that he got out of class at 3:00 p.m. on September 10, 2008, and that he noticed a group of about 20 people in the parking lot near Burger King. He heard a boy yelling, but did not know the boy. He denied being in a fight with D. C.

II. DISCUSSION

Defendant contends that the evidence was insufficient to support the findings that he committed the charged offenses because Johnson's identification of him as the assailant was improbable and uncorroborated. We review the juvenile court's findings for substantial evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Under this standard, we must view the record "in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid.*) If the circumstances reasonably justify the trial court's finding, we cannot reverse merely because a contrary finding might also be reasonably deduced from the circumstances. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) We will reverse only if it "clearly appear[s] that upon no hypothesis whatever is there sufficient substantial evidence to support [the judgment]." (*Ibid.*)

Here, Johnson identified defendant as the perpetrator. Johnson knew defendant as a student from school and was able to describe him and the clothing he was wearing with particularity. He also identified him shortly after the incident in an in-field showup. Defendant was wearing the clothing that Johnson had described to Officer Brady. While Johnson's testimony regarding the details of the assault varied at trial as to whether he was in the parking lot or at the Burger King when the fight started, and as to defendant's clothing, the fact remains that he consistently testified that he saw defendant hit D. C.¹ Moreover, Johnson acknowledged that his recall of the events was better when he gave

¹ On cross-examination, Johnson testified that he was in the Burger King restaurant before the fight and ran outside and saw defendant "beat on" D.C.

his statement to Brady at the time of the incident rather than at trial, which occurred more than three months later. In sum, substantial evidence supports the juvenile court's findings.

Defendant also argues that Johnson's version of the incident differed from the evidence in that D. C. told Brady he was hit from behind and the stipulated facts implied that there was more than one assailant. While the evidence suggests that there were others at the scene that may have participated in the fight, defendant was positively identified as a perpetrator. Any contradictions in the evidence were for the juvenile court to resolve. (*People v. Robertson* (1989) 48 Cal.3d 18, 44.)

Defendant next contends that the matter must be remanded to the juvenile court to make the required determination under section 702 of whether his offenses were misdemeanors or felonies. The Attorney General concedes that the record is lacking.

Section 702 provides in pertinent part, "[i]f the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." In *In re Manzy W.* (1997) 14 Cal.4th 1199, 1204-1205 (*Manzy W.*), our Supreme Court ruled that the obligation under section 702 is mandatory. Further, due to the possible ramifications of a felony conviction, the court ruled that a remand to the juvenile court is required unless the record shows that the court was aware of and actually exercised its discretion under section 702. (*Manzy W.*, at pp. 1204, 1209.) The "setting of a felony-length maximum term period of confinement, by itself, does not eliminate the need for remand when the statute has been violated. The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Id.* at p. 1209.)

Here, defendant's offenses of assault by force likely to produce great bodily injury and battery causing great bodily injury are wobblers. (Pen. Code, §§ 245, subd. (a)(1), 243, subd. (d).) During the dispositional hearing, the court declared that the two offenses were felonies and that the maximum period of confinement was five years. The court also stated, "And we have to order, it's a felony, submission of specimen samples and

print impressions, and probation will direct the minor where to go for that.” While the findings on the record would appear to comply with the mandate of section 702 (see *In re Kenneth H.* (1983) 33 Cal.3d 616, 620, fn. 6), the court’s minutes do not indicate a finding under section 702, nor is there an express declaration on the record that the court exercised its discretion. (See Cal. Rules of Court, rule 5.795(a) (rule 5.795(a)).)

Rule 5.795(a) provides: “Unless determined previously, the court must find and note in the minutes the degree of the offense committed by the youth, and whether it would be a felony or a misdemeanor had it been committed by an adult. If any offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and expressly declare on the record that it has made such consideration and must state its determination as to whether the offense is a misdemeanor or a felony.” It is arguable that the court was aware of its discretion to treat the charges as felonies or misdemeanors and that any error in failing to include the finding in the clerk’s minutes was harmless (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209). Yet the court’s remarks at the dispositional hearing do not fully comply with rule 5.795(a) which requires the court to make an express declaration on the record that it has considered whether a wobbler offense should be classified as a misdemeanor or felony. The Attorney General concedes that the record is inadequate in this regard. We therefore remand for the trial court to specifically declare whether it is treating the charges as felonies or misdemeanors.

III. DISPOSITION

The matter is remanded to the juvenile court to declare whether defendant’s offenses are misdemeanors or felonies as required by section 702 and rule 5.795(a), and, if necessary, a recalculation of the maximum term of confinement. In all other respects, the dispositional order is affirmed.

RIVERA, J.

We concur:

REARDON, Acting P.J.

SEPULVEDA, J.